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RIGHT OF STATE TO WITHDRAW ITS RATIFICATION OF AN AMENDMENT TO THE CONSTITUTION.

It is asserted in all the books that, with respect to proposed amendments to the Constitution of the United States, an act of the legislature ratifying the amendment may not be reconsidered, but that an act rejecting the amendment does not preclude a subsequent ratification. What authority is there, or can there be for this rule, provided the state ratifying the amendment reconsiders its action before the Secretary of State has canvassed the states ratifying the proposed amendment and has promulgated the results of such vote?

Admitting that a particular interpretation of a rule of constitutional law may be based on public acquiescence in legislative or official construction of a certain provision of the constitution, then the rule that a ratification of an amendment cannot be reconsidered, rests on a sound basis. For, in the stormy days of reconstruction, when the fourteenth amendment was submitted to the states, some states (New Jersey and Ohio) ratified and then rejected the amendment, while other states (North Carolina, South Carolina and Georgia) rejected the amendment and then, on reorganization of the governments in such states, ratified it. Secretary Seward consulted Congress, and a concurrent resolution was adopted declaring that the amendment had been ratified, although at the time, sufficient states had not ratified the amendment, if the action of New Jersey and Ohio in subsequently reconsidering their action were taken into account.

All this is historical but has some interest in relation to the prohibition amendment, in view of the fact that it is certain that a long and bitter fight is to be made on the question of the adoption of this amendment, and every question relating to the process of amending the constitution as well as the character of such amendments, will be threshed out.

In the debate in the Senate on the provision in the resolution submitting the prohibition amendment, requiring ratification within seven years, Senator Penrose made an interesting reference to this question, saying:

"Some of the advocates of this amendment contend that it should have no time limit for ratification by three-fourths of the states. This contention is based on the assumption that a state may reverse its action after having refused to ratify, but once having ratified an amendment it cannot change its action. This is supported by the action of Congress in 1868 in declaring that the fourteenth amendment had been ratified by three-fourths of the states, though New Jersey, Ohio and Oregon declared by resolutions of their legislatures that they withdrew their assent. If that one example sustains the theory that a state may not withdraw its assent to a constitutional amendment we still have a constitutional amendment pending before the state legislatures. In 1810 Congress submitted to the states an amendment declaring:

"'If any citizen of the United States shall accept, claim, receive, or retain any title of nobility or honor, or shall, without the consent of Congress, accept and retain any present, pension, office, or emolument of any kind whatever from any emperor, king, prince or foreign power, such person shall cease to be a citizen of the United States and shall be incapable of holding any office of trust or profit under them or either of them.'

"The amendment was ratified by twelve states and by the Senate of the South Car-

olina Legislature. It was assumed that the House of Representatives of South Carolina would vote for ratification, and the amendment was printed as the thirteenth amendment to the Federal Constitution. The South Carolina House of Representatives failed, however, to give an affirmative vote, and the amendment was supported or ratified by only twelve states, one less than the required three-fourths.

"If it is the contention that a state once having voted to ratify an amendment cannot withdraw its assent, this old amendment submitted by Congress in 1810 must be still pending."

When an amendment to the constitution is submitted by congress to the states for ratification, practically the only right the state has is to express its acquiescence. A vote to reject the amendment has no greater effect than if it failed to pass on the question at all. A subsequent legislature may ratify the amendment, and such ratification may be included by the Secretary of State in computing the number of states whose acquiescence is necessary to sustain the amendment.

The question whether a state can withdraw its assent to a proposed amendment is not so free from difficulty. Certainly such reconsideration of its previous action could not be effective after three-fourths of the states (including the state seeking to reverse its action) had ratified the amendment. Such a rule would destroy the permanence of any amendment as a vital part of the constitution and would keep the matter involved in an amendment a possible political issue for all time to come. That question at one time involved the very existence of the constitution itself when South Carolina attempted in 1823 to repeal the act ratifying the constitution. If anyone of the thirteen original states had no power subsequently to repeal the action by which each state ratified the constitution of 1789, then it is hardly conceivable that a different rule could be applied to amendments.

It is not so clear, however, that a state may not withdraw its assent to an amendment before three-fourths of the states have expressed their adherence thereto. The argument that when a state has ratified an amendment it has exhausted its powers in regard to the matter assumes that the action of a state ratifying an amendment has some validity apart from the action of the requisite number of other states also ratifying it. An amendment is not *partially* adopted when one or two states adopt it; it becomes effective only when three-fourths of the states at any given time are on record as ratifying the amendment.

This view becomes very important when taken into consideration with the suggestion of Senator Penrose, that an amendment once submitted may be considered as pending forever, in spite of the fact that at the time of the submission of an amendment it may have been definitely rejected by a majority of the states. It is conceivable that a state, under certain conditions existing at the time of its submission, may be in favor of ratification; it is not fair to assume that such state would care to be bound by its action in that regard if other states did not see fit to take similar action until fifty or even a hundred years later.

It has been contended that Congress has no authority to limit the period of ratification as it did in the case of the eighteenth amendment, and there is some authority for that statement. (Jameson on Constitutional Conventions, 4th Ed., p. 634). On the other hand it would seem to be necessary to concede either that a state has the right to withdraw its assent to an amendment before it becomes a part of the constitution by the similar action of three-fourths of the states, or else that Congress has the right to prescribe some reasonable period of limitation within which an amendment may be adopted without resubmission.

NOTES OF IMPORTANT DECISIONS.

IS THE REFUSAL OF MANUFACTURER TO SELL TO DEALER, WHO WILL NOT MAINTAIN PRICES, A VIOLATION OF THE SHERMAN ACT?—The Sherman act is better known for what it is not than for what it is. In the recent case of Baran v. Goodrich Tire and Rubber Co. (U. S. D. C., S. D., N. Y., Jan. 17, 1919), the court declared that "the enforcement of the Sherman Act, if that act were read literally, would reach nearly every commercial enterprise."

In this case plaintiff alleged that defendant had formed an alliance with a New York company to act as selling agent for its automobile accessories; that it conspired with its agent to prevent dealers from reselling its goods for less than a stipulated price; that for that reason defendants refused to sell plaintiffs any of its goods or permit other dealers to sell them such goods, warning such dealers that if they sold any goods to persons named they would themselves be put on a blacklist and unable to procure defendant's goods. The court held on demurrer that this did not constitute a restraint of trade within the meaning of the Sherman act. The court said:

"There is no restriction upon title alleged. The selected dealers who got the merchandise could do as they pleased with it. No agreement among the dealers to fix prices or restrict sales to the consumer is set forth. The sole gravamen of the action is the attempt of the defendants to prevent price cutting by refusing to sell to dealers who did not maintain the suggested price. There is no decision of an appellate court construing the Sherman act to which I have been referred that prevents a single trader from rejecting a customer because he did not like the prices at which the customer resold, or otherwise disapproved of his mode of conduct. Nor does the fact that a single trader extends his policy of refusing to sell to any one of many customers who may cut prices impose any additional legal liability. It is impossible to see how a single person may choose one customer or reject one customer without impropriety and not separately select or reject a number of customers with equal freedom."

It is difficult to see how the court differentiates the case of Dr. Miles Medical Co. v. Park & Sons, 220 U. S. 373, which held that a contract between a manufacturer and dealers fixing the price on resale of a manufactured article constituted an unlawful restraint of trade. If that proposition is sound, then, a conspiracy to effect the same result by blacklisting those who refuse to maintain a fixed price and threatening other dealers with a withdrawal of the right to handle their goods, would appear to constitute an unlawful restraint of trade.

The case of the Tea Co. v. Cream of Wheat Co., 227 Fed. 46, on which the court relies holds only that where the article sold is not, because of its intrinsic or patented qualities, a subject of monopoly, there can be no restraint of trade. That would not be true of the principal case, since it could probably easily be proven that the intrinsic and patented quality of defendant's goods made their refusal to sell, except on condition of fixing price on resale, a restraint of trade.

IS POLICE ADMINISTRATION BY A CITY A CORPORATE OR GOVERNMENTAL FUNCTION?—It is well settled by authority that a city is liable for its negligence when it acts in a ministerial or corporate capacity but is not liable when acting in a governmental capacity. The bone of contention in all the cases that involve this distinction is whether the function being exercised when the accident occurred was corporate or governmental. In a recent Iowa case the lower and upper courts disagreed on the question whether the driving of an automobile by police officers in pursuance of their duties at a high rate of speed was a corporate or governmental function. Jones v. Sioux City, 170 N. W. 445. In this case, the lower court held that the administration of the police department was a governmental function and that it did not make any difference what the business of the police officers was when the accident occurred. The Supreme Court held that it cannot be said that everything a police officer does in the line of his duty is governmental in its nature. That some things he may be required to do, as for instance, to stretch ropes to keep crowds away from certain places, or to use an automobile to carry supplies or patrolmen to outlying stations was purely ministerial. The court held therefore that in a suit against a city wherein plaintiff alleged injury by being struck by an automobile of the police going at an excessive rate of speed, it was necessary for the city to set up and prove affirmatively that the automobile at the time of the accident was being used in furtherance of some direct effort to enforce the law, as to answer a riot call, etc. On this point the court said:

"A city is not exempt from liability for every act of a policeman simply because he is such. Thus, in Shinnick v. Marshalltown (137 Iowa, 72, 114 N. W., 542), one of defendant's police officers, at the direction of the mayor, placed a rope across one of the principal

streets for the purpose of stopping travel. It was held that the city was liable, but on the ground, it is true, that this constituted a nuisance, and the city was bound to keep its streets free from nuisances. In Twist v. Rochester (37 App. Div., 307, 55 N. Y. Supp., 850, aff'd without opinion in 165 N. Y., 619) it was held that a city could not escape liability for the defective construction of its patrol line, used by the police department of the city, on the ground that the department was created by law for the discharge of a public duty. The court based its decision upon the fact that the patrol line was the result of a business arrangement on the business side of the municipality, and it was in no sense in furtherance of a public duty. When the line was made, the city could use it for any legitimate purpose connected with its police, or otherwise, without changing the character of the thing from a private, pecuniary matter to a public one. So, in the present case, the city automobile could be used for any purpose connected with its police, or, as contended by appellant was the fact, it could be used for other purposes than police duty. It would be quite material, of course, how the automobile was being operated, and used at the time in question."

THE FRAUDULENT DESTRUCTION OF WILLS—SUGGESTIONS FOR A LEGISLATIVE PREVENTIVE.

The fraudulent destruction of wills by heirs-at-law is a field probably of more importance than is generally realized. Many wills are probably destroyed, with fraudulent intent, each year, with little or no possibility, under the present law, that any of these wills can be established. But, if legislatures will awaken to the real situation, it does not seem impossible to enact a statute that will diminish the number of these frauds.

The consensus of opinion, as evidenced by legislation and by judicial opinion at almost every time during the period of civilization known to modern man, has sanctioned the right of the owner of property to devise or bequeath it to beneficiaries of his own choice. Reasonable liberty in the disposal of property at death affords some incentive to honest toil and thrift. The right to name devisees and to exclude heirs-at-law is a right now so well established as to seem to most persons a deep-seated moral right and one which should be duly safeguarded against any violations by dishonest persons.

The law of wills, as it exists in most jurisdictions, supplies to the unscrupulous heir-at-law an inviting opportunity to enrich himself by fraudulent destruction of a last will and testament. If a will has last been seen in the possession of the testator but is not to be found after his decease, there is a presumption of fact that the testator himself has destroyed it *animo revocandi*.[1] Of course, this presumption may be rebutted, but probably not once in a thousand or even ten thousand times will this be possible; for the astuteness and care of the defrauder and the surrounding circumstances are usually such as to eliminate all such possibilities. We will consider a possible and perhaps typical instance. A, an aged man, owning a large amount of property, resides with his son and only heir-at-law, B. A makes a will devising a large sum to his church or to a distant but favorite relative. A keeps the will in a table drawer in his room in B's house. While A is helpless during his last illness, B fraudulently destroys the will. The devisee, knowing of the previous existence of the will and of its contents, seeks to establish it as a lost instrument and to probate it. The devisee is met at once by the presumption that the testator himself destroyed the will with the intention to revoke. B being the only person knowing the facts and naturally being unwilling to tell anything but falsehoods in the premises, we are confronted by a condition which makes the presumption, for all practical purposes, just as effective as if it were legally conclusive.

How often such a fraud is perpetrated, of course, no one can say, as the same secrecy which prevents legal redress also pre-

(1) Davis v. Sigourney, 8 Metc. 487; Lillie v. Lillie, 3 Hagg. 184; Schouler on Wills, 5th ed., p. 501; Thompson on Wills, p. 412.

vents printed reports, news items, and definite verbal statements of such occurrences. Numerous instances have occurred, however, in which the above-mentioned presumption has been the only cause for determining that the will has been revoked, and some of the cases strongly indicate destruction of the will by the heir-at-law. But indications of such fraudulent destruction must be indeed strong before a court will consider them sufficient to rebut the presumption. Any lawyer of long experience in probate practice can probably recount some instances in which he suspects, for very good reason, that there has been such fraudulent destruction. It seems probable that many wills are fraudulently destroyed each year, and it seems possible that hundreds of such instances occur annually. All this occurs under the very effective protection given the defrauder by the present law of wills. Protection should be accorded the holder of a right; it should not continue to be held out to the defrauder. On the existence and prevalence of this evil probably all will agree without great hesitation; on the choice of a preventive measure, there is likely to be less agreement. No satisfactory reform could be made by abolishing the presumption of destruction by the testator *animo revocandi,* as many actual revocations are doubtless given effect only by indulging in this presumption.

The effectiveness of state statutes now so commonly in force, protecting titles to realty by means of a record in the office of a county receiver, suggests to one's mind the possible efficacy of another kind of recording act,—an act making it possible, but not incumbent upon, a testator to have his will recorded during his own lifetime. It is far from the intention of the writer to suggest that such recording shall have any effect upon the title during the lifetime of the testator. The very nature of a will is such that it speaks only as of the time of the death of the testator. The following is suggested as an outline of a plan for an Act for the Recording of Wills Before the Death of the Testator:

1. That any testator may, during his lifetime, have his will recorded in the office of the county recorder of deeds, in files kept in the utmost security for that purpose.

2. That such will is to be revocable only by a written instrument executed by the testator in a prescribed manner, such revoking instrument, however, to be effective whether recorded or not. It would, of course, be hard to argue that revocation should be made to depend upon both the execution and recording of a revoking instrument; as such a scheme would sometimes prevent a testator from making a reasonably quick and easy change in testamentary dispositions just before his death.

The most obvious objection to such a recording is the utter lack of secrecy as to the testator's intended disposition of his property. In many instances, the life of the testator would be made unpleasant, or even miserable, if all of his relatives, during his lifetime, knew the contents of his will. This objection could be met by adding a provision for the execution of sealed or "mystic" wills, such as may now be executed in Louisiana, where a testator may enclose his will in an envelope and seal it in the presence of witnesses.[2] Such a will could then be left in the custody of a public officer specified by law for that purpose.

Testamentary dispositions of property should be protected. They can be protected.

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(2) "One (kind of will) is the 'mystic testament,' which consists principally in enclosing one's instrument of disposition in an envelope and sealing it in the presence of witnesses."—Schouler on Wills, 5th ed., p. 7.

WHAT PREPONDERANCE OF EVIDENCE IS NECESSARY TO SUSTAIN AN ACTION.

The rules of evidence are generally alike in civil and criminal cases, although there has, from the nature of the different kinds of action, arisen a different measure of proof required to justify judgments therein.

Beyond Reasonable Doubt. — In all criminal cases, so far as we are aware, it is now required that before a conviction can be had, it must be sustained by evidence that the party accused is guilty "beyond a reasonable doubt." This term has time and again been defined—not always clearly or aptly. This no doubt occurs from the fact that it is not easy to say what may be a *reasonable doubt.* In a case occurring in a *nisi prius* court more than a half century ago, presided over by one who afterwards became distinguished as a clear-headed judge and a wise statesman, we find this statement as to what may be considered as being meant by beyond a reasonable doubt:

"We have frequently used this expression 'convinced beyond a reasonable doubt.' It is necessary that you should understand what we mean by the expression 'a reasonable doubt.' A reasonable doubt is an honest uncertainty existing in the minds of a candid, impartial, diligent jury, after a full and careful consideration of all the testimony, with a single eye to the ascertainment of the truth, irrespective of the consequences of their finding. It is not a mere speculative doubt voluntarily excited in the mind, in order to furnish a pretext for avoiding the rendition of a disagreeable verdict. Such a doubt is considered by the law as merely captious. With the consequences of your verdict you have nothing to do, farther than this, that they should induce you to examine the testimony with the utmost care, and to exert, in the very best manner of which you are capable, the faculties of your minds to ascertain the truth. For you have but a single duty to perform, and that is to find the truth. You will, therefore, gentlemen, when you retire, give this case your most earnest and faithful consideration with but one object in view, namely, to ascertain whether the defendant is guilty or innocent; and if, after candidly weighing all the testimony, and giving to it such influence as in law and reason it deserves, there exists in your minds an honest doubt of the sufficiency of the proof as to any matter indispensable to be established by the State to warrant conviction, you will give the accused the benefit of such doubt by rendering a verdict of acquittal. For the law, in its humanity, deems it better that many guilty men should go unpunished for want of adequate proof of guilt, than that an innocent man should be convicted upon insufficient testimony."[1]

This is about as clear an exposition as will be found, anywhere, and little could be gained by further exemplification or citation of authorities.

Preponderance of Evidence. — In civil cases as a general rule, the rule of "beyond a reasonable doubt" has never been applied, and the rule that a "preponderance of the evidence" is sufficient to justify a finding for the plaintiff, has been adopted. There have been some courts, however, in certain civil cases, which have applied the "beyond a reasonable doubt" rule; this is the exception and not the rule. This rule of the preponderance of the evidence being sufficient to sustain the action, at first applied to both civil and criminal cases, and as man became more enlightened, regard for life and liberty increased, and this naturally led to an exception to the rule, or rather to the introduction of another rule, that in criminal cases the accused should not be convicted if there was *reasonable doubt* as to his guilt. As to what is meant by "preponderance," the following, taken from an approved charge, gives the general rule:

"The law in this case, and indeed in every case, is that a party coming into a court of justice must satisfy the jury by what is called a fair preponderance of evidence as to the justice of his claim. What

(1) Thurman, J., in State v. Summons, 9 W. L. M. (Ohio, 1852), p. 407.

we mean by the fair preponderance of evidence is this: Preponderance refers to something that may be weighed. Of course, we cannot get a pair of scales, and by some arbitrary method put on one side the testimony of the plaintiff and on the other side the testimony of the defendant and say which one outweighs the other, or whether it is evenly balanced, but you are to try to do that mentally as far as possible.

"The law says that unless the plaintiff satisfies you throughout the entire case of the correctness of his story to such an extent that outweighs the proof of the defendants, he cannot recover. In other words, if the testimony is evenly balanced, it shows that there is some doubt in your mind; that it is not sufficient; that is, if the testimony of the plaintiff weighs just the same as that of the defendant you must find for the defendant—that is the law. The plaintiff can only recover where his testimony outweighs that of the defendant."[2]

The only thing in this charge that might be subject to criticism is where it is said that the jury must *satisfy* themselves that the *fair* preponderance will sustain the action. In some jurisdictions it is held that this is more than what is required—that there are no degrees of preponderance—that the word *fair* is synonymous with *clear;* that the opinion of the jury cannot be fettered by grades in preponderance, or degrees in the weight of the evidence. If it preponderates at all, it is sufficient.[3]

While in other jurisdictions it is held that the word *fair* should not be used, yet it is not sufficient error to cause a reversal.[4]

It would seem that where the matter is explained as in the charge cited from the New York case above quoted from, that the jury could not have been misled and all that they were required to do was to *satisfy* themselves that the evidence of plaintiff be of more force or weight than that offered by defendant, in order for him to recover.

Clear and Convincing.—There are certain issues raised in civil cases in which more than a preponderance of the evidence is required to sustain the claims made. In language similar but not always couched in the same words, a rule has been established that the evidence must be clear and convincing to prove an alleged fact. It seems to have been promulgated by courts of equity and founded upon public policy. One court has held that it is only applied in courts of equity and in trial by that court and would not apply when the same issues are tried by a jury.[5]

But this is not the general rule. When the issues are such that they must be sustained by "clear and convincing" proof, courts of review have gone into the record, and enforced the rule if it has not been followed.[6]

This "clear and convincing" rule does not require the same degree of proof as "beyond a reasonable doubt," but it is pretty hard to draw the dividing line. Sometimes the courts use the expression "beyond a reasonable doubt." In an early Ohio case[7] where suit was brought against an insurance company and defense was made that the property was wilfully burned by plaintiff, the rule laid down by 2 Greenleaf's Ev. Sec. 408, was followed, that the crime must be as fully proven as if plaintiff was on trial on an indictment. But this holding has not been commended by subsequent Ohio decisions.[8]

And it is stated that the modern tendency is to exclude such rule in all civil cases. Even in an action for slander for words which imputed to plaintiff the crime of horse stealing, and the defendant, as a defense pleaded the truth of the defamatory words, in order to maintain the defense it was held that it was not necessary that it be proven beyond a reasonable doubt.[9]

(2) Roberge v. Bonner, 185 N. Y. 265.
(3) Russell v. Russell, 6 Ohio C. C. 296.
(4) Kirchner v. Collins, 152 Mo. 394.
(5) Holt v. Brown, 63 Iowa 319.
(6) Olinger v. McGuffey, 55 Ohio St. 661.
(7) Lexington Insurance Co. v. Paver, 16 Ohio 324.
(8) Lyon v. Fleahman, 34 Ohio St. 155.
(9) Ball v. McGinniss, 40 Ohio St. 204.

In a recent case this same court says:[10]

"The term 'clear and convincing' has come to have a well defined meaning with the bench and bar. It indicates a degree of proof required in civil cases. * * * less than the degree required in criminal cases, but more than required in the ordinary civil action."

In the same case approving the rule that, in actions against the estates of deceased persons by persons sustaining a family relation, for compensation for services rendered, a contract should be shown by "clear and convincing" proof; if, however, the action was against a living person, defendant in the suit and competent to testify, a preponderance is sufficient.

The same court in Cole v. McClure[11] held that to establish a lost or destroyed will the evidence of its execution and its contents must be clear, strong, positive, free from bias and convincing beyond a reasonable doubt. In this same case it is said: "By satisfactory evidence, which is sometimes called sufficient evidence, is intended that amount of proof which ordinarily satisfies an unprejudiced mind, beyond a reasonable doubt."

Evidence is said to satisfy the mind when it is "such as frees the mind from doubt, suspense or uncertainty." To satisfy a body of men of the truth of a disputed fact requires much more than a preponderance of the evidence; "clear and convincing evidence" must be adduced.

No general rule can be laid down as to when the evidence must be "clear and convincing" in order to sustain a certain issue. Generally it may be said that it is required when it is sought to vary a written instrument by parol evidence.—To establish by parol, a trust in real estate.—To reform written instruments.—To decree specific performance of a parol contract.—To establish lost instruments.—To prove gifts *causa mortis*.

(10) Merrick v. Ditzler, 91 Ohio St. 267.
(11) 88 Ohio St. (1913) 1.

The following are instances where more than a preponderance of the evidence was required:

Acknowledgment of Debt to Take Out of Statute of Limitations.—A clear, distinct and unequivocal acknowledgment of a debt is sufficient to take a case out of the statute. It must be an admission consistent with a promise to pay. * * * There must be no uncertainty as to the particular debt to which the admission applies. It must be so distinct as to remove hesitation as to the debtor's meaning.[12]

Giving of Note Implies Settlement.—The giving of a promissory note is *prima facie* evidence of an accounting and settlement between the parties and that the maker was indebted to the payee upon such settlement to the amount of the note. To overcome the presumption a very clear preponderance of evidence is required.[13]

Mistake in Description of Property in Deed.—This court is of the opinion that a mistake in the description of the property conveyed is not shown by clear and convincing proofs as required in such cases.[14]

Impeachment of Judgment.—Where a judgment of a court of competent jurisdiction is attacked, it is not sufficient to show that there is a doubt about the jurisdiction, but it must be made to appear clearly, by a fair preponderance of the evidence that no jurisdiction was acquired, and the recitals to that effect are false; nothing but satisfactory evidence in that regard will be received.[15]

Impeachment of Written Instrument.—It is error to submit a question of fraud to a jury to overturn a written instrument upon slight parol evidence. The evidence in such cases must be clear, precise and indubitable; otherwise the case should be withdrawn from the jury.[16]

(12) Palmer v. Gillespie, 95 Pa. St. 340.
(13) Campbell Printing Press v. Yorkson, 32 N. Y. Supp. 265.
(14) Shulter v. Toledo, 57 Ohio St. 667.
(15) Hayes v. Kerr, 45 N. Y. Supp. 1064.
(16) DeDouglass v. Traction Co., 198 Pa. St. 432.

Setting Aside a Settlement.—Principle and public policy alike require that when parties after a full and fair opportunity of examining and deciding upon mutual accounts, have adjusted and settled them, the accounts should be conclusive. Any other rule would be dangerous and oppressive and often work the greatest injustice, and the evidence to surcharge an account should be clear and satisfactory.[17]

Bastardizing Children.—To bastardize and disinherit a child born in lawful wedlock the clearest and most conclusive evidence of non-access of the husband is required. This doctrine rests upon the very highest grounds of decency and morality.[18]

Claims Against Estates.—Public policy requires that claims against estates of the dead should be established by very satisfactory evidence and the courts should see to it that such estates are fairly protected against unfounded and rapacious raids.[19]

Set Aside Order of Partition.—To justify the court in setting aside a partition of real estate on the ground of mistake in judgment on the part of the commissioners, the mistake must be a serious one, and the evidence to be too plain to be mistaken.[20]

Set Aside Deed.—If a deed be read falsely to a man too infirm to read it himself, or if the contents be untruly stated to him it may for that reason be avoided. The degree of evidence required to defeat such deed should be sufficient to carry strong conviction to the minds of the jury.[21]

Contracts Between Husband and Wife.—A wife may bestow her property by gift on her husband, or she may contract with him, which will be upheld in a court of equity, but the courts always examine such transactions with anxious watchfulness and dread of undue influence.[22]

(17) Klauber v. Wright, 52 Wis. 313.
(18) Watts v. Owen, 62 Wis. 512.
(19) Van Stoten v. Wheeler, 140 N. Y. 633.
(20) In re Thompson, 3 N. J. Eq. 637.
(21) Eaton v. Eaton, 37 N. J. L. 108.
(22) Farmer v. Farmer, 39 N. J. Eq. 211.

Nuncupative Will.—The testamentary capacity and the *animus testandi,* at the time of the nuncupation, must appear in the case of a nuncupative will, by the clearest and most indisputable evidence.[23]

Delivery of Deed.—Where a deed from husband to his wife is executed by both parties, and duly acknowledged and recorded, evidence to rebut the fact of delivery must be clear and convincing.[24]

Indorsement on Note.—A blank indorsement may, like any other written agreement, be reformed, upon equitable principles, in an action on the indorsement for the purpose of defense. In such action the cause of reformation should be stated by way of cross-petition with a prayer for such relief, and the averment should be supported by clear and convincing proof, to warrant the relief.[25]

To Vary Written Indorsement.—Where suit was brought on a note and the defense was that the note was paid and the indorsement of the original payee transferring the same was a mere memorandum made at the request of the transferee, and did not pass the title to the note, the evidence to support this defense must be clear and convincing. A mere preponderance is insufficient.[26]

Engrafting of Trust by Parol.—The deeds of conveyance from F. H. to his son J., upon which is sought by parol evidence to engraft an express trust, are upon their face absolute. Now if it be conceded that such a trust may be established by parol evidence, yet it has been held that such trust can only be established by evidence "clear, certain and conclusive" in proof not only of the existence of the trust at the time of the conveyance but also of its terms and conclusions. The proof must show the existence of the trust and so conclusively as to remove all reasonable and well-founded doubts.[27]

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(24) Wells v. Am. Mort., etc., 109 Ala. 431.
(25) Farr v. Ricker, 46 Ohio St. 265.
(26) Olinger v. McGuffey, 53 Ohio St. 661.
(27) Stall v. Cin., 16 Ohio St. 174.

LABOR UNIONS—CONSPIRACY.

ROOT v. ANDERSON et al.

(St. Louis Court of Appeals. Missouri. Dec. 3, 1918.)

207 S. W. 255.

A petition alleging that defendants, as members of labor organizations, wrongfully and unlawfully sought to injure plaintiff's moving picture business by inducing patrons and intending patrons to refrain from patronizing his theater because of his alleged unfairness to union labor, alleging no compulsion, threats, or intimidation, did not state a cause of action for conspiracy.

ALLEN, J. This is an action prosecuted against numerous defendants who are alleged to be members of certain labor organizations. The case is before us upon the second amended petition filed by plaintiff, which is as follows:

"Comes now the plaintiff, leave of court being first had and obtained, and files his second amended petition, and for cause of action states that he is now, and at all times hereinafter mentioned was, the owner and proprietor of a moving picture show known as the Eagle Theater, situated and located in the city of St. Louis, Mo., at 1719 South Broadway, and had always as such maintained a good reputation as a moving picture exhibitor, and that his said theater had always been freely patronized by the public at large residing in the city of St. Louis, Mo., as well as persons visiting in said city; that the defendants and others whose names and addresses plaintiff does not know are members of an organization known as the Moving Picture Machine Operators' Union, Local 143, I. A. T. S. E., and Central Trades and Labor Union, labor organizations with their headquarters at the city of St. Louis, both of which said union organizations are affiliated with the American Federation of Labor, a powerful labor organization.

"That on or about the 1st day of September, 1914, and ever since that date, the defendants and each of them, and said Moving Picture Machine Operators' Union, Local 143, I. A. T. S. E., have circulated and distributed, or caused to be circulated and distributed, and still continue to circulate and distribute, publicly and privately, at and near the said Eagle Theater so operated by plaintiff as aforesaid, the following circulars, to-wit:

" 'Don't patronize the Eagle Theater, 1719 South Broadway. They have locked out their union operator for refusing to work below the union scale of wages. They have raised their hand against the working man. Tell your friends. Moving Picture Machine Operators' Union, Local 143, I. A. T. S. E., affiliated with the Central Trades and Labor Union and American Federation of Labor.'

" 'Don't patronize the unfair Eagle Theater. Locked out their union operator. Tell your friends. Stay away! Bleibt weg!'

"Plaintiff further states that the facts stated in said circular are false, defamatory, and scandalous, in that plaintiff did not lock out a union operator for refusing to work below the union scale of wages, and further that plaintiff did not raise his hand against the working man, and further that plaintiff did not lock out his union operator for refusing to work below the union scale of wages.

"Plaintiff further states that, in addition to the circulars and distribution of said false and libelous circulars aforesaid, the defendants and each of them, conspiring together for the purpose of depriving plaintiff of his right to work in his own theater and for pure spite, and for no other purpose, willfully, maliciously, and wickedly caused, and still cause, pretended sympathizers of union labor to picket and stand near the entrance of plaintiff's said theater and urge upon customers of plaintiff and other persons about to attend the plaintiff's theater to refrain from so doing, stating to said customers and intended customers of plaintiff that the plaintiff was employing scab labor, was and is unfair to union labor, and had locked out the union operator, and urged, and still urges, said customers and intended customers of plaintiff to refrain from going into said theater by reason thereof.

"Plaintiff states that said circulars have been printed and distributed among the public at large, and particularly among the customers of plaintiff in both the English and German languages by the defendants and each of them and at their instance and request, for the sole purpose of injuring the plaintiff's business, without right or authority so to do, and for no reason other than the plaintiff has insisted upon doing work and has operated his own picture machine in his own theater, as he has the right to do.

"Plaintiff further states that said written and spoken words of and concerning the plaintiff aforesaid and his said business were false, defamatory, and scandalous, as a direct result of the speaking and publishing of which said words the plaintiff's business has been seriously crippled, and he has lost over 150 customers who had theretofore been customers and accustomed to deal with plaintiff and to purchase tickets in order to observe the exhibition given by plaintiff as aforesaid, thereby depriving the plaintiff of said customers and of the profits and advantages which he otherwise would have derived from a continuance of such dealings.

"Plaintiff further states that the acts of the defendants and each of them aforesaid were malicious, and were by the defendants and each of them known to be malicious, wrongful, and wicked, by reason of all of which plaintiff has suffered actual damages in the sum of $1,200.

"Plaintiff further states that the acts of the defendants and each of them is a continuing wrong.

"Wherefore plaintiff prays judgment against the defendants and each of them in the sum of $1,200 actual damages, and inasmuch as the acts of the defendants and each of them are intentionally wrongful and wicked and malicious, plaintiff asks $3,000 exemplary damages or smart money, and for which aggregate sum of $4,200 plaintiff prays judgment against the defendants and each of them."

The defendant interposed a demurrer upon the ground that this petition does not state facts sufficient to constitute a cause of action. The trial court sustained the demurrer, and plaintiff declined to plead further, whereupon final judgment was entered upon the demurrer, dismissing plaintiff's suit. From this judgment the plaintiff prosecutes the appeal before us.

It will be observed that the petition does not charge that the defendants, or any of them, resorted in any way to violence, threats, or intimidation in order to compel or induce persons to refrain from dealing with the plaintiff as customers. In this respect the averments of the petition go no farther than to charge that these defendants, acting in concert, sought by means of persuasion merely to induce persons not to patronize plaintiff's theater. "Picketing," in the sense in which that word is used under such circumstances, for the purpose alone of peaceful persuasion, argument, or entreaty, is not unlawful or actionable. See St. Louis v. Gloner, 210 Mo. 502, 109 S. W. 30, 124 Am. St. Rep. 750. In re Heffron, 179 Mo. App. 639, 162 S. W. 652, and cases there discussed. In the instant case there is no attempt made to state a cause of action as for the doing of any act whereby to compel or induce persons against their will to refrain from having business relations with this plaintiff; on the contrary, the entire tenor of the petition is to the effect that the acts complained of amounted to nothing more than mere matter of argument and persuasion whereby it was sought to convince persons in the vicinity of defendant's theater that they ought not in fairness to patronize him. Such being the nature of the acts complained of as constituting, when done or caused to be done by defendants acting in concert, an unlawful conspiracy, we think that the demurrer was well ruled.

It is said by appellants that the trial court evidently fell into error in maintaining the demurrer by reason of a failure to distinguish between a petition such as this, seeking a recovery of money damages, and a bill in equity seeking injunctive relief under like circumstances. It is quite true that acts which cannot be restrained in equity may afford abundant ground for an action for damages (see Wolf v. Harris, 267 Mo. 405, 184 S. W. 1139; Flint v. Hutchinson Smoke Burner Co., 110 Mo. 492, loc. cit. 502, 19 S. W. 804, 16 L. R. A. 243, 33 Am. St. Rep. 476), but we are of the opinion that the court committed no error in sustaining the demurrer to this petition as for failure to state facts sufficient to warrant a recovery of damages.

The judgment is accordingly affirmed.

REYNOLDS, P. J., and BECKER, J., concur.

NOTE.—*Circulation of Untrue Statement About a Business as Actionable Conspiracy.*—It occurs to me, that the reversing opinion in this case lays too much stress upon the proposition of the respondents being members of a labor union and picketing applicant's place of business in a peaceful way so as to enforce a supposed grievance. Whatever may be thought as to the proposition of what one may lawfully do by himself, this also is true when two or more act in concert to accomplish the same thing, yet it seems to me that there is nothing in such a principle to justify two or more acting in concert to spread slanderous reports or to permit libelous statements, in regard to a lawful business by another, whether they belong to a labor union or not.

Thus in Deupree v. Thornton et al, 97 Neb. 812, 151 N. W. 305, L. R. A. 1917 C, 65, it was held that to sign and circulate a statement which would be libelous if untrue, but which in fact is true, is not of itself sufficient proof to establish a conspiracy, and even then, if a libelous statement is published with good motives and for justifiable ends, it is not libelous.

There is much in this statement to be criticized, but there is in it what seems one sound proposition, and that is that the signing and circulation of an untrue statement, let me add regarding a business, may be sufficient evidence of a conspiracy.

In Webb v. Drake, 52 La. Ann. 290, 26 So. 791, it was held that when several persons have identical grounds of complaint and entertain like feelings of resentment against another and to gratify their feelings, they seek to destroy his business, there is sufficient evidence of actionable conspiracy to make them liable both for actual and exemplary damages.

In this case there was evidence to show that defendants were the most influential citizens of a town and they were so exasperated against plaintiff that they determined upon retaliation because plaintiff as assessor had begun proceedings against them for failing to make returns on their property. They, therefore, established a boycott among drummers visiting the town, so that they ceased to patronize plaintiff's hotel. In the case considered here it is alleged that the circulars contained false statements and that they were circulated for spite.

In L. D. Wilcutt & Sons Co. v. Discoll, 200 Mass. 110, 85 N. E. 897, 23 L. R. A. (N. S.) 1236, it was held that a labor union could not

impose fines upon its members to prevent them from working for or accepting employment from a person with whom it was having an industrial war, because employers are entitled to a free labor market. But this seems opposed to the general current of the cases.

In George Jones Glass Co. v. Glass Blowers' Assn., 77 N. J. Eq. 219, 79 Atl. 262, 41 L. R. A. (N. S.) 445, it is held that where by statute "picketing" in a peaceful way is lawful, such a statute does not legitimize an invasion of private rights nor prevent an injured party from having full redress.

In Barnes v. Chicago Typographical Union, 232 Ill. 424, 81 N. E. 940, 14 L. R. A. (N. S.) 1018, 13 Am. Cas. 54, the court proceeded on the theory that it was unlawful for employes of a labor union to act in concert for the purpose of injuring one's business. In England it has been held that while every member of a labor union may induce other laborers to enter a combination to keep up the price of wages, yet he may not enter a combination with the object of interfering with the perfect freedom of another. Springhead Spinning Co. v. Riley, 37 L. J. Ch. N. S. 889, 19 L. T. N. S. 64. And peaceable persuasion is unlawful where its purpose is to inflict injury. Quinn v. Leatham, A. C. 495, 85 L. T. N. S. 289.

In Carter v. Oster, 134 Mo. App. 146, 112 S. W. 995, it is held that employes may act in concert "for any purpose they conceive to be their welfare," provided "their conduct is dominated by such a motive, rather than by a malicious desire to injure someone else."

In De Minico v. Craig, 207 Mass., 593, 94 N. E. 317, 42 L. R. A (N. S.) 1048, it was said arguendo that "to make a strike a legal strike, the purpose of the strike must be one which the court as matter of law decides is a legal purpose, and the strikers must have acted in good faith in striking for such purpose." Even then, in an employe's case, there is no unlimited right to interfere with a business, and *a fortiori*, a labor union is not to have any authority to interfere with a lawful business, where it is only incidentally affected.

In Gompers v. Buck's Stove & Range Co., 221 U. S. 418, 55 L. ed. 797, 31 Sup. Ct. 492, 34 L. R. A. (N. S.) 872, in speaking of the vast power in labor unions it was said: "This power, when unlawfully used against one, cannot be met except by his purchasing peace at the cost of submitting to terms which involve the sacrifice of rights protected by the constitution; or by standing on such rights and appealing to the preventive powers of a Court of Equity."

And in Missouri it has been held that truth justifies in a libel suit, but it is not said that, if one in a meddling way tells an injurious truth of another, that the latter has no remedy whatsoever. It is only when a plaintiff sues in libel, that truth is justification. It is not clear under plaintiff's petition that there was any necessity in public or official duty for the labor union in the instant case to interfere with plaintiff's business, and certainly not if, being actuated by spite, it circulated an untruth to plaintiff's damage.

C.

ITEMS OF PROFESSIONAL INTEREST.

REPORT OF MEETING OF IDAHO BAR ASSOCIATION.

The biennial meeting of the Idaho State Bar Association convened Tuesday, Jan. 21, 1919, in the Federal Court Room at Boise, Idaho, and continued in session for three days. There were present about seventy-five attorneys of the State. The morning session on January 21st was devoted to receiving reports of standing committees and of the Committee on New Constitution. The latter committee recommended, and the recommendation was approved, that a standing committee be appointed to investigate the desirability of incorporating the Association either under general laws or by a special act. The dues for 1919 of members in the Naval and Military service of the United States were remitted.

The afternoon session was held before the Supreme Court as a memorial service for the sixteen attorneys who had died since the last meeting. Appropriate addresses were delivered and resolutions adopted.

President James H. Hawley delivered an address at the evening session, after which the proposed new Constitution of the Association was discussed and adopted. Twenty attorneys were admitted to membership.

At the morning session, January 22nd, Charles M. Kahn delivered an interesting paper on "The Law of Community Property," which resulted in considerable discussion and the appointment of a standing committee to investigate and recommend changes in the community property laws of the State and in probate proceedings.

The afternoon session was devoted to a report on the recently adopted Code of Laws of Idaho by a special committee of the Bar and an address thereon by Ben Oppenheim, Esq., the Code Commissioner.

In the evening, Hon. Frank Martin, of Boise, addressed the Association on "Relief of the Supreme Court." The condition of the docket of said court is such that relief is imperative and it was the unanimous opinion of the Association that more judges should be provided. Pending the passage of the necessary Constitutional amendment permitting an increase of judges, it was suggested that commissioners be provided for. Further discussion of this matter and of the Codes was had at the morning session of January 23rd.

Hon. Frank S. Dietrich, United States District Judge for Idaho, delivered an address on "Writing and Reporting Judicial Opinions" at the afternoon session, January 22nd, and suggested a number of remedies for relief in this direction.

The Association condemned the practice of filing written briefs in the District Courts of the State.

At this session the following officers were elected, to serve two years:

President: Willis E. Sullivan, Boise.
Secretary: Sam S. Griffin, Boise.
Treasurer: N. Eugene Brasie, Boise.

Beginning at 6:30 p. m., Thursday, January 23rd, the members of the Association enjoyed a banquet at the Boise Commercial Club, over which Hon. William Morgan, Chief Justice of the Supreme Court of Idaho, presided as toastmaster. Hon. M. A. Kiger and Hon. E. W. Whitcomb, members of the House and Senate, respectively, Captain Edgar T. Hawley of the Aerial Service, Major C. M. Booth of the Infantry, Lieut. C. M. Holst of the Red Cross, all former practicing attorneys of the State, and Hon. James H. Hawley, retiring President of the Association, delivered addresses.

A vigorous membership campaign is being planned and it is hoped that at its conclusion the seven hundred attorneys of the State will all be affiliated with the Association.

Respectfully,
SAM S. GRIFFIN,
Secretary.

CORRESPONDENCE.

NECESSITY FOR TRAINED MEN AS JUDGES.

Editor Central Law Journal:

Permit me to congratulate you on your No. 1, Vol. 88, January 3, 1919. This is by far the best number I have received in my different subscriptions to the Journal. The editorial, "Are the People Themselves a Court of Last Resort," the excerpt, "The Reign of the Law," and the article, "The New Function for Courts —Declaring the Rights of Parties," are three of the best articles I have ever read, and coming together as they do in a single number makes that number of the Journal not only exceedingly valuable but almost impossible to equal, not to say excel.

If you will kindly permit, would like to direct your attention further to the fact that you mention but do not carry out into workable detail and that is in your editorial "The Administration of Justice Requires Trained Men to Do It Properly." You have never said anything more true. There have been articles and discussion in yours and other journals on the matter of expediting justice, of taking the making of rules of its administration out of the hands of legislatures and placing it in the hands of the courts, etc., ad nauseam, but not a syllable before about "trained men to do it properly."

I recognize that mere training alone is not sufficient. Picking out a young man and then giving him some mere academic training is far from sufficient, neither would it be sufficient to put a young man in some of the inferior courts to get such training. It would not give him that close touch with life that is necessary to proper administration of justice. Have given much thought to this matter and from my observation and study of the matter, have come to the conclusion that there should be both an age and general practice qualification for all judges. There is an old saying that "Young Men for War, Old Men For Counsel." A man with 25 or 30 years of active general practice has a much better general knowledge of the law, its application, deficiencies, and wise administration, than a younger man, no matter how much of a fault-finding reformer he may be. Furthermore, if we made it a rule that only active general practitioners of mature years should be eligible for the bench, we would not only have the advantage of their years of experience and learning, with mature judgment resultant, but it would be an inducement, more so than at present, for a lawyer to follow the practice of the law in a careful, studious, conscientious manner, recognizing that though thereby he might not be able to accumulate the amount of wealth that others less conscionable and more tricky might do, but he would have a good chance of closing his career with a few years on the bench and hand the name and fame thereof to his posterity. This would result in betterment of conditions in two directions. It would tend to give us better judges and would also tend to give us lawyers better in more ways than one as it holds out to them a probable reward for well doing. There is practically none such at present, save the inner consciousness a man has of well doing. In general, to

get on the bench these days requires a personal or political pull, and therefore to so aspire, the first thing to do is to work for such pull; honesty and qualifications become secondary. Is not this the fact? Furthermore, a conscientious lawyer, when he gets to mature years, will not enter the scramble with younger men for the place, and younger men of necessity are more numerous than the old, are disposed to and do make more combinations to attain their end. People are ready to help them along ("He is a friend of mine"), whether to attain some personal end, or merely to say they helped put him on the bench, and claim some of its effulgent honor therefrom. The older man, however, has seen his friends drop out of life, one by one, and unless he has been a mere wire puller, would not have the support against the younger, more virile and more ambitious younger men. He knows this, and knows and feels it unbecoming to join an almost useless scramble so far as he is concerned. However, if years of experience were required as preliminary qualification, and not mere ambition, these same younger men would be looking about as to the qualifications of the older men, with a result on the whole much more satisfactory in every respect than the present system, with no pre-requisite qualifications at all. The only wonder is that we have had as good men on the bench as we have had.

Yours truly,

JOHN P. DELPHEY.

Toledo, Ohio.

[We cannot express how sympathetically we have read the above suggestions of our esteemed contemporary. Having just passed the fortieth milestone of his life, the editor is able to appreciate the fact that he did not know as much law as he thought he did about twenty years ago and is quite certain from personal experience, that wisdom is not always the product of a brilliant intellect, but most frequently results from adequate intellectual equipment combined with thorough experience.

We are convinced that the age limit for judges should not be below thirty-five years. This would limit the possible candidates to those who at least have had experience. While some of these men will not be intellectually qualified, they can be more easily eliminated than younger men, with their great capacity for wire pulling.

We might also state that the primary is wholly unsuited to the process of selecting judges. In the first place it prevents good men from running except at a great sacrifice of those finer instincts which have been heretofore so zealously cultivated and cherished by the profession. Under the second article of the Canons of Professional Ethics lawyers are required to regulate personal aspirations for judicial position by "an impartial estimate of their ability to add honor to the office and not by a desire for the distinction the position may bring to themselves."

It takes more than ordinary capacity for self-restraint for men thus to deny their own desires and the men who will do it are the very men who would in most cases adorn the bench. If the primary law is to remain, however, the only alternative is for local bar associations, through committees selected according to party affiliations, to draft men for nomination and finance the campaign to secure their nomination. Such a call no lawyer would refuse, under ordinary circumstances, but the people will come gradually to see that their best interests will be conserved by the selection of such men to office.—EDITOR.]

HUMOR OF THE LAW.

Doctor—What was the most confusing case you ever tried?

Judge—A case of champagne. I hadn't got half-way through it before I was all muddled up.

Here's to the woman with many a care,
Who sits all day in an office chair,
And at night, when her day's work there is through,
Goes home and finds more work to do.
Gets up in the morning and cooks and scrubs,
And wrestles around with laundry tubs.
Yet the usual hour finds her smiling there
Beside her desk, in the office chair.
If she's strong enough to these burdens tote,
Here's to the states where they let her vote!

—Globe-Democrat.

Mark Twain once addressed an audience in the interest of his fellow townsman, General Joseph Hawley, who was a candidate for re-election to the United States senate, and said, in the course of a droll address: "General Hawley deserves your support, although he has about as much influence in purifying the senate as a bunch of flowers would have in sweetening a glue factory. But he's right; he never would turn any poor beggar away from his door empty-handed. He always gives them something—almost without exception a letter of introduction to me, urging me to help them."

WEEKLY DIGEST.

Weekly Digest of Important Opinions of the State Courts of Last Resort and of the Federal Courts.

Copy of Opinion in any case referred to in this digest may be procured by sending 25 cents to us or to the West Pub. Co., St. Paul, Minn.

1. **Alteration of Instruments**—Materiality.—An agreement to pay interest on interest is a "material alteration" of a note affecting the sum payable for interest within Negotiable Instrument Act, May 16, 1901 (P. L. 211) § 125.—Schroyer v. Thompson, Pa., 105 Atl. 274.

2. **Bankruptcy**—Contempt.—A creditor of a bankrupt, though having a dischargeable claim, does not become guilty of contempt of the bankruptcy court merely by taking proceedings in another court to enforce his claim, where no order forbidding such action has been made, and especially when the creditor had no knowledge of the bankruptcy proceedings.—In re Weisberg, U. S. D. C., 253 Fed. 833.

3.——Equity.—A court of bankruptcy is a court of equity.—Bridgeton Nat. Bank v. Way, U. S. C. C. A., 253 Fed. 731.

4.——Estoppel.—Where a trustee in bankruptcy voluntarily submitted himself and his rights to jurisdiction of a state court in action to foreclose a chattel mortgage upon outstanding accounts of the bankrupt, he is in no position to lawfully avoid the enforcement of a decree to account for moneys received by him resulting from the accounts, wheresoever the same may have been collected.—Commercial Trust Co. of New Jersey v. Drayton, N. J., 105 Atl. 241.

5.——Family Corporation.—A family corporation, organized by a bankrupt when insolvent, to which he transferred his property in an attempt to place it beyond the reach of creditors, and which borrowed money and paid off certain judgment liens on the property, occupies no better position with respect to the property than the bankrupt, and is not entitled to subrogation to such liens.—In re Liller, U. S. D. C., 253 Fed. 845.

6.——Jurisdiction.—Where a United States Court having jurisdiction is about to sell bankrupt's property for benefit of creditors, the state courts, having jurisdiction of homestead exemption under Constitution, would not recognize property as exempt from seizure and sale, as they could not enforce their decree or interfere with federal court's jurisdiction.—Aubry v. Guillaumin, La., 80 So. 241.

7. **Banks and Banking**—Ultra Vires.—Where a cotton buyer shipped to a factor and a bank guaranteed factor against any loss in cotton, and drafts with bill of lading attached were drawn by buyer on factor and indorsed to bank which gave buyer credit therefor the bank was liable to factor for loss sustained by it though guaranty was ultra vires.—Bennett v. W. A. Gage & Co., Okla., 176 Pac. 744.

8. **Bills and Notes**—Alteration.—To defeat the rights of a holder of commercial paper in due course, a fraudulent alteration must be a material one.—Citizens' State Bank of Greenup v. Johnson County, Ky., 207 S. W. 8.

9.——Extension.—Telephoning to holder of note regarding extension, and failure of holder to keep promise then made to meet maker, did not even raise a question for the jury on the issue as to whether there was agreement for extension.—Thomas v. Derrick, Tex., 207 S. W. 140.

10. **Carriers of Goods**—Misdelivery.—Where a storekeeper sold his business to an employe, who had been in the habit of receiving and giving receipt for goods at a carrier's warehouse in the storekeeper's name, the carrier was liable to a consignor for goods delivered to the employe, where ordered, subsequent to the sale, by the employe in the name of the former storekeeper, to whom they were consigned; carrier and consignor both being ignorant of sale of business.—L. Kommel & Son v. Champlain Transp. Co., Vt., 105 Atl. 253.

11.——Receipt by Carrier.—A receipt taken by a carrier for goods is prima facie, but not conclusive, proof of delivery.—Gulf, C. & S. F. Ry. Co. v. Rosenthal Dry Goods Co., Tex., 207 S. W. 167.

12.——Special Cars.—The obligation to carry goods often requires that special kinds of cars be supplied for the transportation of goods, which the carrier has accepted or holds itself out to carry.—Chicago, R. I. & P. Ry. Co. v. Lawton Refining Co., U. S. C. C. A., 253 Fed. 705.

13. **Carriers of Passengers**—Elevator.—Owner of building for whom passenger elevator is being operated may be liable for injuries sustained in fall of elevator, where operator was powerless to prevent overloading of elevator.—Campbell v. Bradbury, Cal., 176 Pac. 685.

14. **Charities**—Intention.—Where testator gave his estate to charity, specifically missions, after wants of wife, daughter, and another were supplied, failure to name organizations he wished to benefit, selection of which was left to others, was insufficient to defeat his clearly expressed intention.—Co n v. Attorney General, Mass., 121 N. E. 397.

15. **Chattel Mortgages**—Passing of Title.—The title to property upon which a chattel mortgage is executed does not pass to mortgagee, but remains in mortgagor.—Young v. Phillips, Mich., 169 N. W. 822.

16. **Compromise**—Setting Aside.—A written settlement between parties who are able to con-

tract is the law unto them until it is set aside in a direct action for that purpose.—Succession of Rouse, La., 80 So. 229.

17. **Contempt** — Summary Proceeding.—Contempt is only a summary proceeding to enforce obedience to court's orders and where the main issue only concerns the court and the defendant in rule.—Le Banc, Limited, v. Port Barre Timber & Tie Co., La., 80 So. 203.

18. **Contracts** — Condition Precedent.—When within its constitutional powers the Legislature has sought by statute to provide that certain contracts may be made only after obtaining certain permits, the obtaining of the latter are conditions precedent to the making of enforceable contracts.—Napa Valley Electric Co. v. Calistoga Electric Co., Cal., 176 Pac. 699.

19.——Consideration.—Surrender by lender of individual note of borrower for note of bankrupt corporation, to meet whose pay roll loan had been used, was in itself consideration for written promise of borrower to pay lender difference between declared dividend, in company's bankruptcy proceeding, and amount owned lender, as soon as dividend was paid him.—Timson v. Parrott, Mass., 121 N. E. 423.

20.——Construction of.—Where persons commit their agreements to writing, their intentions cannot be sought outside the four corners of the written instrument.—Bank of Napoleonville v. Knobloch & Rainold, La., So. 214.

21.——Forbearance.—Forbearance to sue is an adequate consideration for a promise made in reliance thereon, but there must be an agreement to that effect, and a mere forbearance without an agreement is not a good consideration where there is nothing to prevent the bringing of suit in any time. — Schroyer v. Thompson, Pa., 105 Atl. 274.

22.——Mutual Assent.—To make a contract there must be mutual assent, and the assent must comprehend the whole proposition. — Browne Grain Co. v. Walker, Tex., 206 S. W. 859.

23. **Corporations** — Dividends.—Profits realized by a corporation are not "dividends" until so declared by its proper officials, but distribution of profits, however made, are dividends, the form of distribution being immaterial.—In re Thompson's Estate, Pa., 105 Atl. 273.

24.—Estoppel.—Where a corporation was organized to take over the business of a partnership, which by contract acknowledged patent infringement and agreed to cease, held, that any estoppel arising from the contract was effective against the corporation, and as it continued the old-method manufacture it was estopped to deny infringement.—Dudlo Mfg. Co. v. Varley Duplex Magnet Co., U. S. C. C. A., 253 Fed. 745.

25.——Public Utility.—The charter authority of a corporation to become a public utility is a mere naked authority to do business as such, and until its business is so pursued such charter does not make the corporation a public utility subject to regulation.—De Pauw University v. Public Service Commission of Oregon, U. S. D. C., 253 Fed. 848.

26. **Counties**—Comity.—The comity existing between states and nations sanctioned the rule that an inhabitant of another state or another nation has free access to courts for the redress of wrongs or the prosecution of rights.—Coss v. Coss, Tex., 207 S. W. 127.

27. **Criminal Law**—Credibility.—At common law the right to determine the credibility of a witness testifying in a criminal prosecution is within the province of the jury.—State v. Hataway, La., 80 So. 227.

28.——Cross-Examination.—Credibility of a witness may be impeached by proof on cross-examination of contradictory statements.—Lockett v. State, Ark., 207 S. W. 55.

29.——Jeopardy.—Defendant, who by habeas corpus causes a second sentence to be imposed upon himself, ordinarily will not be heard to claim twice in jeopardy.—Ex parte Bouchard, Cal., 176 Pac. 692.

30.——Overt Acts.—A guilty intention, unexecuted, or unconnected with an overt act or outward manifestation, cannot be made the subject of punishment under the law.—Proctor v. State, Okla., 176 Pac. 771.

31.——Res Gestae.—An unmailed addressed envelope with its inclosure, signed by defendant, found at the place of the assault 30 minutes after its occurrence, was admissable as part of the res gestae, though disclosing defendant was a paroled prisoner.—People v. Ballard, Mich., 169 N. W. 844.

32.——Statutory Construction.—Criminal statutes cannot be extended to cases not included within the clear and obvious import of their language; and, if there is doubt as to whether the act charged is embraced in the prohibition, such doubt is to be resolved in favor of defendant.—People v. Ellis, Mich., 169 N. W. 930.

33. **Damages**—Future Suffering.—"Suffering in the future" from injury is distinguished from "permanent injury," in that the former will persist after the trial, but may cease, while the latter will last throughout life.—Colby v. Thompson, Mo., 207 S. W. 73.

34. **Death** — Circumstantial Evidence.— Circumstantial evidence showing merely a probability that an accident, which no living person witnessed, happended as alleged in a petition claiming damages for injuries to a person deceased, is an insufficient basis upon which to rest judgment for plaintiff.—Bishop v. Town of Mansfield, La., 80 So. 217.

35. **Divorce**—Alimony.—An incidental award of alimony for a gross sum payable in three installments, declared to be in full of all claims for alimony or on any other account, is enforceable in the same manner as an ordinary judgment for debt.—Bassett v. Waters, Kan., 176 Pac. 663.

36.——Insanity.—Where a wife who is the defendant in a divorce suit becomes insane after deserting her husband and is confined in an insane asylum, her seperation from her husband ceases to be "willful, continued, and obstinate" within the meaning of Divorce Act, § 2, subd. 2.—Gordon v. Gordon, N. J., 105 Atl. 242.

37.——Jurisdiction.—Jurisdiction of circuit courts in chancery in divorce proceedings is entirely statutory.—Heck v. Bailey, Mich., 169 N. W. 940.

38.——Ne Exeat.—On wife's petition for temporary and permanent alimony and attorney's fees, alleging husband's abandonment, sale of household goods, refusal to contribute to support of herself and children, and that, on hearing of her suit, he would depart, court did not err in issuing a writ of ne exeat.—Crapps v. Crapps, Ga., 97 S. E. 680.

39. **Easements**—Prescriptive Right.—In suit between adjoining lot owners involving title to a stairway and land occupied by it, held, that defendant's use of stairway and space above it for over 20 years, after mutual revocable license had been revoked, was such as to give him a prescriptive right to said use so long as present building stands.—First Nat. Bank v. Vanden Brooks, Mich., 169 N. W. 920.

40. **Eminent Domain**—Additional Servitude. —A railroad in a street which carries freight as well as passengers imposes no additional servitude.—City of Albany v. United States Fidelity & Guaranty Co., 176 Pac. 705.

41.——Natural Gas.—Company organized to transport and serve public with natural gas may condemn for its pipe lines lands necessary to proper conduct of its business as a public carrier; such use being none the less a public use because pipe lines therefor are carried by gasoline plant to extract gasoline and to facilitate its piping to consumers.—Pittsburgh & West Virginia Gas Co. v. Cutright, W. Va., 97 S. E. 686.

42. **Equity**—Equal Equity.—As between Persons having equitable interests, the rule "qui prior est tempore, potior est jure," applies only where the equities are equal.—Hess & Skinner Engineering Co. v. Turney, Tex., 207 S. W. 171.

43. **Estoppel**—Equitable Estoppel.—The doctrine of equitable estoppel is not exclusively of equitable cognizance, for, although the creature of equity and depending upon equitable

principles, it is enforced alike by courts of law and equity.—La Rosa v. Nichols, N. J., 105 Atl. 201.

44.——Subsequent Grantee.—Subsequent grantees may rely upon any ground of estoppel against the original grantor that the original grantees could.—Lockart v. Kentland Coal & Coke Co., Ky., 207 S. W. 18.

45. **Executors and Administrators**—Personal Liability.—Rule that only effect of contracts of representative in attempting to complete a an executor or administrator is to bind himself individually applies to contract by personal building contract entered into by decedent in his lifetime.—Exchange Nat. Bank of Atchison v. Betts' Estate, Kan., 176 Pac. 660.

46. **Fraud**—Fraudulent Representation.—In a buyer's action for fraud in the sale of the manufacturing rights of a vending machine, falsely represented as being perfect and the best of its kind, the rule of caveat emptor did not apply; the essential elements of the fraudulent representations being established.—Arnold v. Somers, Vt., 105 Atl. 260.

47.——Opinion.—Statements by purchasers of mortgage, attorneys for mortgagors, that premises were not worth more than was due them, and that they had procured all rights and title of mortgagors, made to mortgagors, were mere matters of opinion, not constituting actionable fraud.—Smith v. Boothe, Ore., 176 Pac. 793.

48. **Frauds, Statue of**—Executory Contract.—Delivery and acceptance of property sold under executory contract of sale takes contract out of statute of frauds.—Bicknell v. Owyhee Sheep & Land Co., Idaho, 176 Pac. 782.

49. **Garnishment**—Waiver.—A garnishee defendant's failure to appear in the garnishment proceedings, whereby default is taken against him, is not a waiver of his right to insist upon compliance with the statute, nor does it estop him from insisting that the proceedings were irregular on motion to open the default.—W. H. Warner Coal Co. v. Nelson, Mich., 169 N. W. 852.

50. **Gifts**—Delivery and Acceptance.—To constitute a valid gift inter vivos, there must be a gratuitous and absolute transfer of the property from the donor, taking effect immediately, and fully executed by delivery and acceptance. —Martin v. Martin, Tex., 207 S. W. 188.

51. **Guardian and Ward**—Confidential Relation.—Courts watch with great jealousy transactions of guardians with their wards or any dealings between them affecting the estate of the ward.—Francis v. Sperry, Okla., 176 Pac. 732.

52. **Homicide**—Deadly Weapon.—Where one intentionally uses a deadly weapon upon a vital part of body of another there is a presumption of intent to kill which cannot be rebutted by assailant's testimony that he did not so intend, but whether he intended to use it upon a vital part of body is a question of fact.—Commonwealth v. Zec, Pa., 105 Atl. 279.

53.——Self-Defense.—The right of self-defense does not imply right of attack, and, where the aggressor provokes an affray in which he attacks his adversary or produces the occasion which makes it necessary for him to commit the assault, he cannot justify his act on the ground of self-defense.—State v. Schroeder, Kan., 176 Pac. 659.

54. **Husband and Wife**—Gift.—Where husband caused deed of land to be made to his wife intending it as a gift, it became her separate property, though the deed did not state on its face that title was to be so vested in the wife. —Johnson v. Johnson, Tex., 207 S. W. 202.

55.——Head of Family.—A married man, being the head and master of the married community, may sell the community property without consulting his wife.—Demarets v. Demarets, La., 80 So. 240.

56.——Joint Tenancy.—Where note and mortgage were made to husband and wife as joint tenants, the survivor did not take the entire title therein in the absence of evidence establishing a gift inter vivos or causa mortis of the deceased spouse's share.—Ludwig v. Brunner, Mich., 169 N. W. 890.

57.——Judgment Against Wife.—In married woman's suit to recover damages for seizure and sale of her property and by her husband to aid and assist her, any judgment rendered therein would be binding upon husband as well as upon wife.—Malmore v. Martinez, La., 80 So. 212.

58.——Tenancy by Entirety.—Land held by husband and wife as tenants by entirety is not subject to levy under execution on judgment rendered against either alone.—Sanford v. Bertrau, Mich., 169 N. W. 880.

59. **Infants**—Voidable Contract.—The contracts of infants are not absolutely void, but only voidable.—La Rosa v. Nichols, N. J., 105 Atl. 201.

60. **Injunction**—Mandatory.—The owner of the servient estate was entitled to mandatory injunction compelling defendant to remove a bulkhead built in a private way, though defendant's acts caused no pecuniary damage.—Congregation Beth Israel v. Heller, Mass., 121 N. E. 400.

61.——Multiplicity of Parties.—A court of equity will not entertain a bill by complainant against a large number of parties, to whom he had sold corporate stock, and who had begun separate actions to recover for fraud on the theory equity will restrain a multiplicity of suits, where proof as to non-reliance on the misrepresentations, etc., would not be binding on all the various parties.—Robinson v. Wemmer, U. S. D. C., 253 Fed. 790.

62. **Insane Persons**—Tort.—An incompetent is liable for injuries received from negligent operation of passenger elevator in a building owned by the incompetent.—Brinck v. Bradbury, Cal., 176 Pac. 690.

63. **Insurance**—Completion of Contract.—When an application for insurance has been made and accepted by the insurer and the assured has done all required to entitle him to receive the policy, the contract of insurance is complete, and, if the assured dies before actual delivery, the beneficiary is entitled to recover.—American Nat. Ins. Co. v. Blysard, Tex., 207 S. W. 162.

64.——Estoppel.—Where a member of a cigarmakers' local union subordinate to the international union has been for years in arrears with his dues, so as to be liable to suspension, but, on solicitation and threats of suspension by the local union, has paid up prior to his death, which payments have been accepted by the international union, the latter is estopped from setting up a forfeiture of membership as a defense to an action by the widow for benefits.—Staffan v. Cigarmakers' International Union of America, Mich., 169 N. W. 876.

65. **Interest**—Liquidated Demand.—Where plaintiff procured for defendant an option on land under defendant's agreement to divide profits realized on sale, amount due plaintiff after sale by defendant at profit constituted "liquidated demand" on which plaintiff was entitled, by Civ. Code, § 1917, to legal interest from date of sale of land.—Howard v. D. W. Hobson Co., Cal., 176 Pac. 715.

66. **Judgment**—Collateral Attack.—A void judgment in a criminal case could be either directly or collaterally attacked.—Ex parte Bouchard, Cal., 176 Pac. 692.

67. **Landlord and Tenant**—Common Stairway.—Landlord owed tenant duty to use reasonable care to keep common stairway, for use of all tenants, in his control, as safe for its intended use as it was or appeared to be at beginning of tenancy.—Oles v. Dubinsky, Mass., 121 N. E. 405.

68. **Libel and Slander**—Evidence.—In slander action, the plaintiff, after proving the words alleged, may give in evidence other slanderous words of like import to show malice.—Rowe v. Myers, Mich., 169 N. W. 823.

69.——Truth as Defense.—In absence of a constitutional or statutory provision to the contrary, the truth of an alleged libelous publication is a complete defense in a civil action for libel.—Florida Pub. Co. v. Lee, Fla., 80 So. 245.

70. **Mandamus**—Quo Warranto.—Title to a public office may be tried in quo warranto proceedings, and mandamus is not the proper remedy.—Harrington v. Sharpe, Mich., 169 N. W. 888.

71. **Marriage**—Annulment.—A marriage procured by the wife's false representations that she was pregnant by the husband, when she was pregnant by another man, to whose child she later gave birth, will be annulled at the husband's suit, though the wife informed him during acquaintance she had had intercourse with another.—Gard v. Gard, Mich., 169 N. W. 908.

72.——Common Law Marriage.—A cohabitation meretricious in its origin became matrimonial, and a common-law marriage, when, on information of death of woman's first husband, removing the only impediment to marriage, the man declared to her that she was his wife, and thereafter both by habit, conduct, and declarations held themselves out as husband and wife.—Schaffer v. Krestovnikow, N. J., 105 Atl. 239.

73. **Mines and Mining**—Limiting Grant.—Where deed conveys coal and other minerals and certain rights of a character necessary to be enjoyed by grantee, and ordinarily enjoyed in producing minerals by shafting and tunneling, and does not define extent of minerals granted, grant may be limited to minerals ordinarily produced by exercise of granted mining rights.—Rock House Fork Land Co. v. Raleigh Brick and Tile Co., W. Va., 97 S. E. 684.

74. **Master and Servant**—Mitigation of Damages.—Plaintiff, employed by defendant in special service of salesman, was not obliged, on wrongful discharge, to seek employment not of the same general character in order to mitigate damages.—Saunders v. Smith Granite Co., Mass., 121 N. E. 431.

75.——Safe Place to Work.—A master must use the care which an ordinary prudent man would exercise under the same circumstances to furnish his employe a safe place and safe tools and appliances; the degree of care being commensurate with the dangers attending employment.—Clinton & O. W. Ry. Co. v. Dunlap, Okla., 176 Pac. 748.

76. **Mortgages**—Collateral Obligation.—An agreement to give security may be void and the debt continued as a legal obligation.—Bartle v. Bond, Col., 176 Pac. 832.

77.——Revesting Title.—Where the owner of land deeds it to a creditor, taking a land contract back, while the transaction merely amounts in equity to a mortgage, it is a deed in form, and requires a deed from the creditor to revest the title in the original owner.—Farr v. Childs, Mich., 169 N. W. 868.

78. **Municipal Corporations**—Governmental Duty.—Police officers, though employed by municipal corporation, exercise a governmental, and not a corporate, function, and, without positive statute to the contrary, cannot, by their tortious acts, render employing municipality liable in damages ex delicto.—Joliff v. City of Shreveport, La., 80 So. 200.

79.——Proximate Cause.—Though plaintiff in crossing an interesecting street was negligent because on the wrong side of the median line of the street on which he was traveling, extended across the intersection, held, that his negligence cannot as a matter of law be deemed the proximate cause of a collision between his motorcycle and defendant's automobile.—Whitelaw v. McGilliard, Cal., 176 Pac. 679.

80. **Negligence**—Attractive Lure.—To warrant inference of implied invitation, the object or thing which induced injured person to go upon premises must, on account of its nature and surroundings, be especially and unusually attractive.—Flippen-Prather Realty Co. v. Mather, Tex., 207 S. W. 121.

81. **Nuisance**—Common Rights.—The unlawful use of flashboards and gate at outlet of boatable lake, to vary height of water from its natural level, affecting common rights of all persons, constitutes a public nuisance.—Hazen v. Perkins, Vt., 105 Atl. 240.

82. **Partnership**—Confidential Relation.—One partner owes a duty to the other partner of fair dealing, and this relationship continues even after the dissolution of the partnership, as to the items or contracts or assets remaining unsettled.—Runnells v. Leffel, Ore., 176 Pac. 802.

83. **Partition**—Division in Kind.—Where lands are susceptible of division without material impairment of their value, a division thereof will be had if desired by the owners, rather than a division of the proceeds after a sale for that purpose.—King v. King, Ky., 207 S. W. 1.

84. **Principal and Agent**—Agent's Benefit.—An agency cannot be used for the benefit of the agent himself or of any other person than the principal, in the absence of an agreement that it may be so used; and, this being a matter of law, all persons must take notice of it.—Arnold v. Somers, Vt., 105 Atl. 260.

85. **Principal and Surety**—Release of Surety.—Agreement between contractor and owner for extension of time within which contractor might complete work, made without knowledge or consent of contractor's surety, discharged the surety.—Schwartz v. American Surety Co. of New York, Mass., 121 N. E. 104.

86. **Release**—Consideration.—Release of all claims for damages by railroad employe, reciting his injury and the consideration of re-employment for a time satisfactory to employer that it might be assured against employe's suit for damages, was without consideration and void, where employe was then in railroad's employ.—St. Louis, I. M. & S. Ry. Co. v. True, Okla., 176 Pac. 758.

87. **Sales**—Conditional Sale.—Where possession of goods is delivered to a buyer under an agreement that there is no conveyance of title, but that the title shall remain in the seller until payment of purchase price, the transaction is a "conditional sale."—Miller-Cahoon Co. v. Lawrence, Idaho, 176 Pac. 774.

88.——Conditional Sale.—A contract for the sale of personal property, under which seller retains title until purchase money is paid in full but gives buyer immediate possession of property, being a conditional sale contract, is not required to be recorded under Comp. Laws 1915, § 11988.—Young v. Phillips, Mich., 169 N. W. 822.

89. **Specific Performance**—Uncertainty in Contract.—Equity will not decree the specific performance of a contract unless its terms are certain and defined. Neptune Fisheries Co. v. Cape May Real Estate Co., N. J., 105 Atl. 212.

90. **Vendor and Purchaser**—Cloud on Title.—Building restrictions constitute a cloud upon the title to real estate.—Ogooshevitz v. Warijas, Mich., 169 N. W. 820.

91. **Vendor and Vendee**—Concurrent Performance.—A land sale contract, in which performance by one is consideration for performance by the other contemplates concurrent performance by both; neither being required to make a tender first.—Caporale v. Rubine, N. J., 105 Atl. 226.

92. **Waters and Water Courses**—Prescriptive Right.—A prescriptive right to the flow of water in a stream can be acquired by 20 years of user.—Suffrouw v. Brewer, Mich., 169 N. W. 841.

93. **Wills**—Accelerating Remainder.—To work an acceleration of a remainder, the particular estate as a whole must terminate, and even then the acceleration results only from the presumed intent of the testator, and will not take place, if contrary to such intent.—Swann v. Austell, U. S. D. C., 253 Fed. 807.

94.——Intention.—The court must seek the intention of testator, and, if ascertained, must give it effect if that is legally possible; but a court cannot make a will for a decedent, nor substitute for methods selected by him a method of its own to carry into effect the purpose of his will.—Succession of Canton, La., 80 So. 218.

95.——Intention.—A cardinal rule in construing a will is to ascertain, if possible, testator's intention from the four corners of the instrument, and to give it effect, if legally possible. Crisp v. Anderson, Mich., 169 N. W. 855.